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No. 872 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

FRANK COSTELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a decree of denaturalization entered by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the District Court is reported at 171 F. Supp. 10 (R. 17-43). The opinion of the Court of Appeals has not yet been reported (App. 2a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1960 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner can be denaturalized for representing that his occupation was "real estate" when he was concededly engaged in the real estate business and the government's inquiry could reasonably be interpreted as calling for no more than his legal occupation.

2. Whether the Court is entitled to draw any inference from petitioner's failure to take the stand in a denaturalization case.

3. Whether due process permits denaturalization where citizenship was granted thirty-three years prior to the institution of suit, the facts alleged as a basis for denaturalization were known to the government thirty-two years prior to the institution of suit, and many material witnesses have become unavailable by reason of death.

4. Whether a decree of denaturalization may rest in part upon evidence tainted by wiretapping.

STATUTE INVOLVED

Section 340(a) of the Immigration and Nationality Act of 1952, 66 Stat. 260:

> "(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the

judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively; PROVIDED, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence."

STATEMENT

Petitioner came to the United States from Italy in 1895, when he was four years old. He was admitted to citizenship by the United States District Court for the Southern District of New York in 1925.

This case represents the government's second attempt to revoke petitioner's citizenship. On October 22, 1952, it filed a complaint seeking his denaturalization

under § 338 of the Nationality Act of 1940, 54 Stat. 1158. Pretrial motions to dismiss on the ground that the affidavit of good cause should have been filed contemporaneously with the complaint were denied. 142 F. Supp. 290, 325. On the fourth day of trial, however, Judge Palmieri granted petitioner's motion to dismiss on the ground that both the affidavit of good cause and the government's evidence at trial were extensively tainted by wiretapping. 145 F. Supp. 892. The Court of Appeals reversed, holding that evidence derived from wiretapping by state officers is admissible in the federal courts and alternatively that the trial court should have afforded the government an opportunity to file a new affidavit of good cause and to demonstrate that it had sufficient untainted evidence at trial.[1] 247 F. 2d 384. On April 7, 1958, this Court granted certiorari and reversed with directions to dismiss the complaint, on the ground that the affidavit of good cause should have been filed contemporaneously with the complaint. 356 U.S. 256.

On May 1, 1958, the government filed a new complaint seeking petitioner's denaturalization under § 340 of the Immigration and Nationality Act of 1952, 66 Stat. 260 (R. 3-14). Factually the allegations of this complaint are very similar to the allegations of the prior complaint. It alleged that petitioner procured his citizenship by wilful misrepresentation in that: (a) he stated that his occupation was real estate, whereas in truth and in fact his occupation was the illicit purchase and sale of alcohol; (b) he stated that Harry C. Sausser, one of his naturalization witnesses, was in the real estate business and had personal knowledge of

[1] This opinion was handed down prior to the decision in *Benanti v. United States*, 355 U.S. 96.

his good moral character, whereas in truth and in fact Sausser was engaged with him in the illicit purchase and sale of alcohol; (c) he stated that the only other name he had ever used was Francisco Castiglia, whereas he had also used the names Frank Stello and Frank Saverio; (d) he stated that he would support and defend the Constitution and laws of the United States and that he would bear true faith and allegiance to the same, whereas he was then violating both federal and state laws relating to alcohol and income tax and intended to continue so to do; and (e) he stated that he had never been arrested or convicted whereas he had been arrested four times and convicted of unlawful possession of a firearm. The complaint further alleged that petitioner procured his citizenship by concealment of a material fact, in that he concealed the fact that Sausser was engaged with him in the illicit purchase and sale of alcohol and knew him to be a person of bad moral character.

This case came on for trial before Judge Dawson, who found that the government had sustained its allegations relating to petitioner's occupation and allegiance (allegations (a) and (d) *supra*). Judgment was accordingly entered revoking petitioner's naturalization (R. 43-44). Judge Dawson stated that he was not convinced that any of the government's other allegations had been established by the degree of proof requisite in an action of this nature (R. 29).

Judge Dawson relied heavily upon certain statements made by petitioner to New York state authorities in 1943 to support his finding that petitioner's true occupation at the time of his naturalization was bootlegging (R. 23-25). Judge Palmieri had previously ruled that these statements were extensively infected with wire-

tapping. 145 F. Supp. 892. Judge Dawson, however, reached a contrary conclusion and held that they were admissible (R. 39-42).

The Court of Appeals affirmed on February 17, 1960. It concluded that petitioner was guilty of wilful misrepresentation when he stated that his occupation was "real estate". The opinion concedes, however, that petitioner was associated with a real estate company of which he later became president and that the government's inquiry as to occupation could have been construed as calling for no more than his legal occupation (App. 7a-8a).

The Court of Appeals was not satisfied that petitioner's oath of allegiance sustained a finding of fraud (App. 9a). It expressly declined to pass upon any of the other allegations of the complaint, which were not relied upon by the trial court (App. 6a). Nor did it pass upon the admissibility of petitioner's statements to New York state authorities.

REASONS FOR GRANTING THE WRIT

1. The decision of the courts below is completely inconsistent with this Court's decisions in *Nowak* v. *United States*, 356 U.S. 660, and *Maisenberg* v. *United States*, 356 U.S. 670. In two cases now pending this Court granted certiorari to determine whether the lower courts properly applied the standards laid down in these decisions, and petitioner submits that the same course should be followed here. Cf. *Chaunt* v. *United States*, No. 593, October Term, 1959, and *Polites* v. *United States*, No. 631, October Term, 1959.

In the *Nowak* and *Maisenberg* cases, petitioners were asked whether they believed in anarchy or belonged to

any organization which taught or advocated anarchy or the overthrow of existing government in this country. In fact, they were not members of any anarchistic organization but they were members of the Communist Party. This Court held that they could not be denaturalized for answering the question in the negative, because they might reasonably have interpreted it as referring solely to anarchistic organizations.

Precisely the same situation is presented in this case. Petitioner was asked to state his "occupation" in May of 1925 and again in September of 1925. The record establishes and the Court of Appeals concedes that he was then associated with the Koslo Realty Corporation and that he subsequently became president of this corporation (App. 7a-8a). The Court of Appeals referred to a real estate transaction which was concluded by the Koslo Realty Corporation in June of 1925, one month after petitioner filed his preliminary form for naturalization and three months before he was formally admitted to citizenship (App. 7a-8a).[2] The record also contains uncontradicted documentary evidence of two other real estate transactions handled by Koslo Realty Corporation during this period.[3]

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[2] The record shows that Koslo Realty Corporation purchased certain property in New York City on December 1, 1924, and sold it on June 22, 1925 (R. 206-208, 223-224). A purchase money mortgage in the amount of $41,230.00 was released on December 21, 1925 (R. 225-226). Petitioner signed this release as president of Koslo Realty Corporation. The government introduced sworn testimony by petitioner to the effect that he realized a profit of $25,000.00 on this transaction (R. 188-189). This sum was substantially in excess of petitioner's average annual income during the years 1919-1932 (R. 185-189).

[3] The record shows that Koslo Realty Corporation purchased three parcels of grounds in the Bronx on August 12, 1925, and sold them to the Rosenblum Realty Corporation on June 22, 1926

The Court of Appeals further found that petitioner could have interpreted the government's inquiry as relating to his legal occupation (App. 8a). Under these circumstances, petitioner could not be guilty of wilful misrepresentation when he answered "real estate".

The contrary conclusion of the court below is inexplicable in the light of *United States* v. *Profaci*, decided by another panel of the Second Circuit on January 12, 1960. There the defendant stated at the time of his naturalization that he had never been arrested, although he actually had a criminal record in Italy. The Court of Appeals reversed a decree of denaturalization on the ground that he could reasonably have interpreted the government's inquiry as relating solely to arrests in the United States, relying upon the *Nowak* and *Maisenberg* decisions.

Here the Court of Appeals endeavored to support its finding of wilful misrepresentation by stating: "We think it obvious that a worldly-wise man such as Costello must have realized that his real occupation was bootlegging and that his dabbling in real estate was but 'dust in the eyes' to conceal his real occupation" (App. 8a). The serious issue presented by this case, how-

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(R. 209-212, 231-232). The record further shows that Koslo Realty Corporation purchased several pieces of ground in the Bronx from the Claire Building Corporation on October 26, 1925, giving back purchase money mortgages in the amount of $70,000 (R. 213-216). On July 15, 1926, Koslo Realty Corporation deeded this land, with the buildings and improvements thereon, to the R.G. & F. Construction Corporation, subject to mortgages aggregating $310,000 and also subject "to present leasings, lettings and tenancies" (R. 227-230). It is apparent that a large office building or apartment was constructed on this property while it was owned by Koslo Realty Corporation.

ever, cannot be avoided by characterizing petitioner as "worldly-wise" and his real estate activities as "dabbling". If this Court is to give meaning and effect to the *Nowak* and *Maisenberg* decisions, it should review this case to determine whether the decision of the courts below is consistent with them. The grant of certiorari in two somewhat similar cases makes it particularly appropriate to grant certiorari in this case.

2. Petitioner did not elect to take the stand on his own behalf and the government did not call him as a witness. The Court of Appeals concluded that "the district court, though it did not do so, might properly have buttressed its findings by the unfavorable inferences to be drawn from the fact that Costello chose to remain off the witness stand" (App. 5a). It ruled that petitioner had no privilege to remain silent because he was not a criminal defendant, citing its prior decision in *United States* v. *Matles*, 247 F. 2d 378, reversed on other grounds, 356 U.S. 256.

The Court of Appeals then proceeded to do what the District Court had not done. It stated that petitioner's failure to produce evidence of other real estate transactions by the Koslo Realty Corporation warranted the inference that there were none such (App. 8a). It went on to state that while an applicant for citizenship might believe he was bound to disclose only his legal occupation, there was no evidence that petitioner so believed (App. 8a). In other words, it concluded that petitioner's failure to take the stand warrants the inference that *he* understood the government's question as calling for disclosure of all income-producing activities, legal or illegal, although the question was plainly susceptible of a more restricted interpretation.

Here again, the Court of Appeals followed a course squarely contrary to the *Nowak* and *Maisenberg* decisions. In *Nowak* the trial court specifically referred to defendant's failure to take the stand in support of its denaturalization decree. 133 F. Supp. 191, 196. This Court, however, refused to infer from Nowak's silence that he must have understood the crucial question as referring to membership in the Communist Party.[4] Absent any evidence as to how Nowak actually understood the question, this Court resolved the ambiguity in his favor.

The right of a denaturalization defendant to stand silent has been considered in two other cases. In the first denaturalization proceedings against petitioner, he was compelled to take the stand over his objection. Judge Palmieri filed an opinion, however, stating that he was in agreement with petitioner's assertion of privilege under the Fifth Amendment and was overruling it only to provide an adequate record for appellate review. 144 F. Supp. 779.

Likewise, Chief Judge Clark expressed grave doubts in *Matles* as to the propriety of compelling a defendant

[4] The opinion states, 356 U.S. at 665, footnote 3:

"No evidence was introduced tending to show that Nowak actually understood Question 28 as calling for disclosure of his membership in the Communist Party. The Government argues that the requisite understanding of the question should be imputed to Nowak, 'an important functionary in the Party, and an intelligent man,' because of the fact that for some period prior to 1937 the deportation and exclusion statutes applied to aliens 'who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law'. Act of October 16, 1918, 40 Stat. 1012. The gap in the Government's proof cannot be filled in such tenuous fashion, especially in view of the citizenship provisions of the Nationality Act of 1906 referred to in the text."

to denaturalize himself. He concluded that "this important issue must of course await final settlement by the Supreme Court." 247 F. 2d at 382. This Court, however, did not reach the issue because it ordered dismissal of the proceedings on the ground that the affidavit of good cause had not been timely filed. 356 U.S. 256.

The issue thus left unresolved in *Matles* is again raised in this case. If it was definitively resolved in *Nowak*, this case was wrongly decided. If it was not definitively resolved in *Nowak*, it should be resolved now. In either event this Court should grant certiorari.

3. The Court of Appeals dismissed from consideration the long delay between naturalization and denaturalization in the opening paragraph of its opinion. It pointed out that this is "another of those troublesome denaturalization cases, instituted by the government in an effort to have the court cancel a certificate of naturalization issued over thirty years ago" (App. 3a). It further pointed out, however, that there was no applicable statute of limitations, and it regarded independent consideration of the defense of laches as foreclosed by *United States* v. *Summerlin*, 310 U.S. 414, 416.

Summerlin, however, was not a denaturalization case. It is well settled that sovereign immunity from laches is based upon public policy and will be recognized only when such immunity serves public policy. *Guaranty Trust Co.* v. *United States*, 304 U.S. 126. The increasing frequency of attacks upon old certificates of naturalization and the resulting hardship upon naturalized citizens require this Court to determine whether such attacks are consistent with due process.

Here petitioner was admitted to citizenship in the Southern District of New York in 1925. He was indicted in this same district for conspiracy to violate the prohibition laws in 1926. The jury was unable to reach an agreement and subsequently the case was dismissed on motion of the prosecution. Petitioner testified at length before a federal grand jury for this same district in 1939, and there was again evidence of alleged prohibition violations on his part.

Under the applicable statutes, it was the duty of the United States Attorney to institute denaturalization proceedings against petitioner if in fact such conduct constituted "good cause" therefor.[5] Instead, the United States Attorney waited for twenty-seven years after petitioner's indictment and thirteen years after his grand jury testimony before instituting denaturalization proceedings based upon his alleged prohibition violations. In the meantime, the naturalization examiners who processed petitioner's application, the witnesses who testified on his behalf, and the judge who admitted him to citizenship have all died.

The Court of Appeals recognized the harshness of decreeing denaturalization under these circumstances (App. 3a). Petitioner urges that due process does not permit revocation of citizenship granted more than three decades ago on the basis of alleged misrepresentations known to the government for more than three decades. This Court should grant certiorari to determine this grave question, since the lower federal courts consider it foreclosed by the *Summerlin* decision.

4. Both the trial court and the Court of Appeals relied heavily upon certain statements by petitioner to

[5] Immigration and Naturalization Act of 1906, § 15, 34 Stat. 601

support their finding that his true occupation was bootlegging. It is petitioner's position that these statements must be excluded from consideration in determining the sufficiency of the government's proof, because they are extensively infected with wiretapping. In order to determine whether the government's proof complies with the standards laid down in *Nowak* and *Maisenberg,* it may become necessary to resolve the admissibility of this evidence. In order to avoid any possible claim that its admissibility is not fairly comprised within the first question presented by the petition for certiorari, petitioner presents the admissibility of this evidence as a separate question.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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AGNES A. NEILL,
VINCENT J. FULLER,
Counsel for Petitioner.

March, 1960.

APPENDIX

APPENDIX

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the seventeenth day of February, one thousand nine hundred and sixty.

Present:

HON. CALVERT MAGRUDER,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

FRANK COSTELLO, *Defendant-Appellant*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 58—October Term, 1959.

(Argued November 17, 1959 Decided February 17, 1960.)

Docket No. 25690

UNITED STATES OF AMERICA, *Appellee*,

—v.—

FRANK COSTELLO, *Appellant*.

Before: MAGRUDER, MOORE and FRIENDLY, *Circuit Judges*.

Appeal from a decree of the United States District Court for the Southern District of New York, Archie Owen Dawson, *Judge*, revoking citizenship, pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1451(a), as amended, 68 Stat. 1232, on the ground that citizenship certificate was obtained willful misrepresentations. 171 F. Supp. 10. *Affirmed*.

EDWARD BENNETT WILLIAMS, Washington, D. C. (Agnes A. Neill and Vincent J. Fuller, Washington, D. C., Morris Shilensky, New York, N. Y., and Hays, St. John, Abramson & Heilbron, New York, N. Y., on the brief), *for appellant*.

MORTON S. ROBSON, Asst. U. S. Atty., Southern District of New York, New York, N. Y. (S. Hazard Gillespie, Jr., U. S. Atty., S. D. N. Y., New York, N. Y., on the brief), *for appellee*.

MAGRUDER, *Circuit Judge:*

This is another of those troublesome denaturalization cases, instituted by the government in an effort to have the court cancel a certificate of naturalization issued over thirty years ago. The proceeding is brought pursuant to § 340(a) of the Immigration and Nationality Act of 1952, as amended, 68 Stat. 1232. This statute contains no provision for limitations, nor is there any other federal statute applicable to the case. And, as Hughes, *C.J.*, said in *United States* v. *Summerlin*, 310 U. S. 414, 416 (1940): "It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights."

It is impossible to say that the statutory provisions for the issuance by the court of naturalization certificates, under certain prescribed conditions, do not constitute a proper judicial function. *Tutun* v. *United States*, 270 U. S. 568 (1926). And despite what may seem to be the harshness of the result, it seems impossible to say that the Congress cannot constitutionally provide a proceeding for the cancellation of a certificate obtained by fraud or concealment. *Knauer* v. *United States*, 328 U. S. 654, 673 (1946). It was so provided way back in the Act of 1906 which, in § 15 thereof, vested jurisdiction in the district courts of suits by the United States Attorney on behalf of the United States "for the purpose of setting aside and canceling a certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured." 34 Stat. 601. See *Johannessen* v. *United States*, 225 U. S. 227 (1912). Such provision for denaturalization was carried forward by Congress into § 338(a) of the Nationality Act of 1940 (54 Stat. 1158-59). In the Immigration and Nationality Act passed in 1952, denaturalization proceedings were also provided for, but the Congress struck out the earlier provision for cancellation of a certificate that had been illegally issued, and confined cancellation to cases where the certificate had been procured "by

concealment of a material fact or by willful misrepresentation." 66 Stat. 260. This provision was reenacted by the Congress in 1954. 68 Stat. 1232.

The Supreme Court has never told us that a denaturalization proceeding partakes of the character of a criminal proceeding. Indeed, in the *Johannessen* case, *supra*, the Court upheld the constitutional validity of a provision in § 15 of the Act of 1906 to the effect that the denaturalization provisions should apply not only prospectively but also "to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws." 34 Stat. 601. In this connection the Court said (225 U. S. at 242): "It is, however, settled that this prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description. • • • The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges."

Although the Supreme Court has many times upheld a decree for the cancellation of a certificate of naturalization, it has prescribed an exacting quantum of proof as requisite to establishing a case by the government against a certificate holder. The case for cancellation must be "clear, unequivocal, and convincing," and should not leave "the issue in doubt." See *Schneiderman* v. *United States*, 320 U. S. 118, 158 (1943); *Baumgartner* v. *United States*, 322 U. S. 665 (1944); *Knauer* v. *United States*, *supra*, 328 U. S. 654 (1946).

If a denaturalization case is a sort of civil proceeding, we are at a loss to see why our scope of review is not limited by the "clearly erroneous" test of the unqualified Rule 52(a) of the Federal Rules of Civil Procedure. If that is so, then once we are convinced that the district court was aware of and applied the proper strict standards of proof—which clearly appears in the case at bar—we ought not to upset

its finding that the defendant had obtained his certificate of citizenship by fraud unless we are satisfied that such finding was "clearly erroneous." See *Corrado* v. *United States*, 227 F. 2d 780, 783 (C. A. 6th, 1955). Of course, fraud is an internal state of mind, and it is possible that a man may give an incorrect answer to a question in a bona fide but mistaken belief as to what the question calls for. But if an applicant for citizenship has in fact no such misapprehension as to what answer the question calls for, and consciously falsifies an answer on a material point, he is certainly guilty of fraud in the baldest sense of the term. The district court believed that Costello was guilty of this kind of fraud, and we certainly cannot say that the finding to this effect was "clearly erroneous."

On the other hand, perhaps we are wrong about our limited scope of review; and it may be that in this very special type of civil proceeding we have a broader power of review, and are under the obligation ourselves to scrutinize the evidence, to satisfy ourselves that the proof offered by the government was "clear, unequivocal, and convincing." See *Baumgartner* v. *United States*, *supra*, 322 U. S. 665, 670-72 (1944); *Brenci* v. *United States*, 175 F. 2d 90 (C. A. 1st, 1949); *Cufari* v. *United States*, 217 F. 2d 404 (C. A. 1st, 1954).

Fortunately, we do not in this case have to determine what our scope of review may be in these cases since we are here more than satisfied that the findings by the district court which will sustain a cancellation of the certificate of naturalization are the only findings possible on the evidence, and that they fulfill the strictest requirements of proof. 171 F. Supp. 10.

We think the district court, though it did not do so, might properly have buttressed its findings by the unfavorable inferences to be drawn from the fact that Costello chose to remain off the witness stand and to introduce no evidence in answer to the government's case indicating fraud. The matters inquired into were within Costello's peculiar knowl-

edge. Since Costello was not a criminal defendant in the present proceedings, he had no privilege to remain silent. *United States* v. *Matles*, 247 F. 2d 378 (C. A. 2d, 1957), rev'd on other grounds 356 U. S. 256 (1958). See also *Vajtauer* v. *Commissioner*, 273 U.S. 103 (1927).

The government's complaint in the present case was filed May 1, 1958. In compliance with the procedural requirement of § 340(a), as amended, the complaint was accompanied by affidavits showing "good cause" for the institution of the proceeding. 68 Stat. 1232. The request for cancellation of the certificate of naturalization was based upon various allegations of fraud and concealment. We mean to be guided by the words of the Supreme Court in the *Schneiderman* case, *supra*, 320 U. S. at 160: "A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status. Consequently we think the Government should be limited, as in a criminal proceeding, to the matters charged in its complaint."

Some of the allegations of fact contained in the complaint were not accepted by the district court as sufficiently established pursuant to the strict requirements of proof imposed upon the government. Though the government now urges us to examine the state of the evidence in these regards, we do not propose to go beyond the findings of fact by the district court. That court based its decree upon findings with reference to two of the issues raised by the complaint: (1) That in the preliminary form for petition for naturalization, and in testimony under oath before a naturalization examiner, and also in his petition for naturalization, Costello knowingly and willfully stated that his occupation was "real estate," whereas in truth his occupation was the illicit purchase and sale of alcoholic beverages; (2) that the defendant swore in his oath of allegiance, on September 10, 1925, that "I will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic; and that I will bear true faith and allegiance

to the same." This was said to be a known falsehood because the defendant was actually engaged at the time in a course of activity which flouted the Constitution and was designed to violate the laws of the United States.

It was established by the United States, from Costello's own mouth, that he was at the crucial dates engaged in bootlegging activities. He gave a statement to Special Agent Sullivan on July 24, 1938, to the effect that he was involved in the liquor business from 1923 or 1924 until a year or two before repeal of the Eighteenth Amendment. In answer to questions by the district attorney in a proceeding before a New York County grand jury in 1943, Costello admitted that he got large sums of money from importing whisky during prohibition days. He admitted that he had reported to the state taxing authorities that for the years 1919 to 1932 his income had totaled $305,000, most of it made in the bootlegging business. If corroboration of these statements is required in the present case, such corroboration is amply found in the testimony of the witnesses Kessler, Kelly and Coffey. The evidence is clear beyond any doubt that during prohibition days Costello's major activity, both in terms of time spent and revenue obtained, was bootlegging.

In his preliminary form for petition for naturalization, in answer to a question requiring him to put down his "present occupation," he answered "real estate." He gave a similar answer in his petition for naturalization.

Of course one has to begin a new occupation at some point of time, and at the outset there necessarily is not a great deal of evidence as to such activity. The evidence relating to Costello's real estate dealings is at best scanty. The government made a check of the real estate records in four counties of Greater New York, which check revealed that Koslo Realty Co., Inc., was organized on December 1, 1924; that some time prior to May 1, 1925, Costello was associated with this corporation. Koslo Realty Co. purchased a piece of property and sold the same on June 22,

1925. Costello later became president of the corporation. How much activity Costello had to expend in this capacity does not appear, nor does it appear whether or not Koslo Realty Co. was engaged in other real estate transactions in other parts of the country not covered by the government's spot check. If there was any further evidence along this line, it would be peculiarly within the knowledge of Costello, and his failure to produce evidence of such activity warrants the inference that there was none such.

We think it obvious that a worldly-wise man such as Costello must have realized that his real occupation was bootlegging and that his dabbling in real estate was but "dust in the eyes" to conceal his real occupation. As the district judge stated: "If a man in that situation had been honest when asked what his occupation was, would he have answered 'real estate'? If he had told the truth he probably would not have been naturalized, but this is no excuse for his using fraud and deceit to secure his naturalization." The term "occupation," the court said, "would commonly be understood to refer to income producing activity to which a person devotes the major portion of his time and from which he derives the greater portion of his income." 171 F. Supp. at 18. Surely it is conceivable that an applicant might believe that the answer called for no more than a disclosure of some "legal occupation." There is no evidence in the record that Costello so believed. If he had given a truthful answer, it is probable that the court would not readily have accepted his assertion of being possessed of "good moral character," and he might not have received his certificate of naturalization. As the district court said: "When he answered that his occupation was real estate he was giving a false and misleading answer and was therefore engaged in a willful misrepresentation in order to secure his naturalization certificate." 171 F. Supp. at 18.

The district court also based its holding upon a finding that Costello falsely swore that he would "support and

defend the Constitution" and "bear true faith and allegiance to the same."

Costello also swore that he was "attached to the principles of the Constitution." Just what this phrase might mean as used in the Nationality Act poses a question of some difficulty. See *Stasiukevich* v. *Nicolls*, 168 F. 2d 474, 477 (C. A. 1st, 1948). We don't believe that the phrase would require a person to believe in the soundness of the Eighteenth Amendment; but at least it would seem to require that the applicant should support an existing provision of the Constitution unless and until it is repealed in an orderly way as provided in Art. V of the Constitution. Therefore, if Costello was at the time engaged in violation of the Eighteenth Amendment and of the Volstead Law, it seems hard to say that he was "attached to the principles of the Constitution."

But the answer to all the foregoing is that the complaint in the present case does not charge that Costello swore falsely in affirming that he was "attached to the principles of the Constitution."

We are not satisfied that the district court was correct in ruling that the oath to "support and defend the Constitution and laws of the United States" means the same as "attached to the principles of the Constitution." It may be urged that the oath which Costello was charged with having violated was merely a political oath calling for a repudiation of allegiance to King Victor Emmanuel III and a statement of allegiance to the United States. We do not have to pass finally on this alleged fraud in the oath, since the first allegation, with reference to the statement of Costello's occupation, is amply supported so as to sustain the charge of fraud and to require us to uphold the decree of denaturalization.

There is only one further point made by appellant that deserves some extended comment. It has to do with the validity of the affirmative defense, specifically pleaded here, that "the complaint is barred under principles of

res judicata." We think there is nothing to the point; in fact, we cannot see how any court could accept the argument advanced by appellant except upon an invincible determination to frustrate finally what the court might regard as an undesirable effort by the government to accomplish the cancellation of an old certificate of naturalization.

This is not the first effort by the government to obtain the cancellation of Costello's certificate. On October 22, 1952, the district attorney filed a denaturalization complaint against Costello under § 338 of the Nationality Act of 1940 (54 Stat. 1158). The allegations of fraud were about the same as in the present complaint. But as then permitted by law, cancellation of the certificate of naturalization was also sought on the ground that the certificate was "illegally procured"; that is to say, that the conditions precedent to naturalization, a "good moral character" and an attachment "to the principles of the Constitution," did not in fact exist. As we have previously stated, the latter ground of cancellation was omitted from the present Act.

Though the United States Attorney filed an affidavit of "good cause" prior to the trial of that earlier action, he failed to submit this affidavit simultaneously with the filing of the complaint. The district court entered an order dismissing the complaint "without prejudice." 145 F. Supp. 892 (S. D. N. Y. 1956). The court of appeals reversed, in an opinion having to do solely with so-called "wire tap" evidence. *United States* v. *Costello*, 247 F. 2d 384 (C. A. 2d, 1957). Upon certiorari the Supreme Court, in a one-paragraph *per curiam* opinion, reversed the judgment of the court of appeals upon a ground not theretofore considered by that court, namely, that an affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings and must be filed along with the complaint when the proceedings are instituted, citing only *United States* v. *Zucca*, 351 U. S. 91 (1956). Accordingly the Supreme Court remanded the case to the district court with directions to dismiss the complaint. 356 U. S. 256 (1958).

When the case got back to the district court, since nothing was said in the Supreme Court mandate about whether the dismissal should be with or without prejudice, the district judge considered that he was bound by the terms of the mandate merely to dismiss the complaint.

There may have been an error by the district court in its refusal to add the words, proposed by the government, that the dismissal of the complaint should be "without prejudice." However, this error, if it was an error, could have been corrected on appeal, and no appeal was taken from the district court's order of dismissal.

In Rule 41(b) of the Federal Rules of Civil Procedure it is provided as follows: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

Rule 41(b) does not state what the effect of a prior judgment on the merits is, but if the dismissal of the earlier complaint was really a judgment on the merits we suppose that that would preclude the government as well as a private litigant from filing another complaint based upon the same cause of action, under principles of *res judicata*.

The district court was persuaded by the government's argument that Rule 41(b) had no application because the dismissal was "for lack of jurisdiction" within the meaning of the rule.

No doubt the word "jurisdiction" is a somewhat slippery one, susceptible of various meanings. In holding, as we do, that Rule 41(b) has no application, we prefer not to say that the district court lacked "jurisdiction" to determine the denaturalization complaint despite the lack of a "procedural prerequisite," namely, the filing of an affidavit showing "good cause" simultaneously with the filing of the complaint. Because the phrase "lack of jurisdiction" is used in immediate conjunction with the phrase "for im-

proper venue," it would be plausible to argue that the word "jurisdiction" is used in the rule in its usual restricted sense. See *Title* v. *United States*, 263 F. 2d 28 (C. A. 9th, 1959).

In striking out the words "without prejudice," as proposed by the government, the district court exercised no discretion, as contemplated in the rule, but merely conceived that it was bound by the mandate of the Supreme Court to dismiss the complaint without saying anything about whether it should be with or without prejudice.

The district court did not determine that its dismissal should be regarded as a judgment on the merits. It made no findings as provided in the sentence of Rule 41(b) saying that, "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." And it is obvious that the Supreme Court, in directing such dismissal, did not suppose that it was directing a determination on the merits, which would preclude the government from starting over again, with this particular statutory "procedural prerequisite" duly observed. In the only case cited by the Supreme Court in its brief *per curiam* opinion, *United States* v. *Zucca*, *supra*, 351 U. S. 91 (1956), the district court had dismissed a complaint for denaturalization, without prejudice to the government's right to institute an action to denaturalize the respondent upon filing an affidavit of good cause. 125 F. Supp. 551 (S. D. N. Y. 1954). The court of appeals affirmed the dismissal (221 F. 2d 805 (C. A. 2d, 1955)) and upon certiorari the Supreme Court in its turn affirmed the judgment of the court of appeals. 351 U. S. 91 (1956). The Supreme Court thought that the district court had correctly dismissed the proceedings because of the failure of the government to file the required affidavit at the time the complaint was filed. But note, that such dismissal had been without prejudice.

It seems to us that Rule 41(b) should be interpreted as applying only to cases in which the trial judge is exercising

some discretion and is not merely acting mechanically pursuant to the direction of a superior court. There must be a rule that a bare "dismissal" is to be interpreted as either with or without prejudice, and 41(b) provides this rule in all cases where the district court has a real discretion in the matter. But there is obviously no such need where the trial court's disposition of the case has been predetermined by a superior court. It would be a violation of the intention of all the courts concerned if the dismissal of the earlier complaint were held in this case to be a judgment on the merits. Appellant's arguments exalt pure technicalities to a wholly unwarranted degree. And see Restatement, Judgments § 49 (1942).

A judgment will be entered affirming the judgment of the district court.